Supreme Court, U.S.
FILED

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No.

IN THE UNITED STATES SUPREME COURT

October Term, 1994

EDWARD D. MARTINSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
to the United States Court of
Appeals for the Seventh Circuit.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether a Defendant is entitled to a two point reduction in sentencing for "acceptance of responsibility" in a mail fraud conviction after trial where he admits all conduct alleged against him except intent to defraud.

Whether the Government has proven a Defendant guilty of mail fraud beyond a reasonable doubt where the Government's direct evidence is merely circumstantial and Defendant testified and denied the element of intent to defraud.

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STATUTES INVOLVED

U.S.S.G. §3E1.1. Acceptance of Responsibility

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:

(1) timely providing complete information to the government concerning his own involvement in the offense; or

(2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently,

decrease the offense level by 1 additional level.

18 U.S.C. §1341. Frauds and Swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. §1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

On December 8, 1992, Defendant, EDWARD D. MARTINSON, was indicted by a Federal Grand Jury on one count of wire fraud in violation of Section 1342 of Title 18 of the United States Code and five counts of mail fraud in violation of Section 1341 of Title 18 of the United States Code. The United States District Courts have original jurisdiction of all offenses against the laws of the United States pursuant to §3231 of Title 18 of the United States Code.

On March 29, 1993, a jury returned guilty verdicts against EDWARD D. MARTINSON on the wire fraud count and four of the mail fraud counts. One of the mail fraud counts had been dismissed voluntarily by the government prior to the commencement of trial. On June 2, 1993 a Judgment of Conviction and Sentence was entered against EDWARD D. MARTINSON. On that same day, Mr. Martinson filed his Notice of Appeal. Thereafter the

government filed a cross-appeal seeking reversal of Mr. Martinson's 2 point reduction in sentencing for "acceptance of responsibility".

The United States Court of Appeals for the Seventh Circuit affirmed Mr. Martinson's convictions but reversed the 2 point reduction for "acceptance of responsibility" and remanded for resentencing.

The indictment essentially alleges that Mr. Martinson, through the efforts of a sales agent, Daniel C. Schneringer, received orders for seafood processing equipment from five seafood canneries, all located in the Pacific Northwest portion of the United States. The indictment further alleges that Mr. Martinson received deposits from the canneries for the production of the food equipment, that the equipment was never produced and that the deposits were never returned. The deposits were alleged to have been sent either through the United States mail or by wire transfer to Mr. Martinson at his place of business in Green Bay, Wisconsin.

The evidence at trial showed the following transactions:

Count	Date	Business	Deposit Amt
---	10/27/87	Farwest Fisheries, Inc.	$7,500.00
ONE	1/14/88	Farwest Fisheries, Inc.	$3,000.00
TWO	1/20/88	Nelbro Packing Co.	$4,450.00
THREE	2/17/88	Canadian Fishing Co.	$2,525.00
FOUR	3/8/88	Queen Fisheries, Inc.	$42,858.35
FIVE	3/18/88	Peter Pan Seafood, Inc.	$36,682.50
SIX	3/24/88	Chugach Alaska Fisheries, Inc.	$15,540.00

The first transaction of October 27, 1987 was never charged in the indictment. The March 19, 1988 transaction was dismissed by the government at the commencement of trial.

A representative of each of the businesses involved testified at trial. None of these witnesses had ever met Mr. Martinson.

The products sought to be purchased from Martinson were required by the fisheries for the upcoming canning season. Daniel Schneringer testified that each fishery's season began as follows:

Farwest Fisheries, Inc.	Mid June
Nelbro Packing Company	Mid June
Canadian Fishing Company	Mid June
Queen Fisheries, Inc.	Mid June
Peter Pan Seafood, Inc.	Mid July
Chugach Alaska Fisheries, Inc.	Late June

On May 23, 1988 Mr. Schneringer caused his attorney to write a letter to each fishery stating essentially as follows:

> I represent Dan Schneringer. Canadian Fishing Company placed an order with Martinson & Associates for Bussey divider sheets at a cost of $5,050. A copy of your purchase order is enclosed. After visiting Mr. Martinson in Wisconsin recently and talking to some of his suppliers, it appears to Dan that Mr. Martinson will not be able to fill the order. Dan strongly suggests that you

> seek an alternate source for the baskets. He will do everything in this power to assist you in finding an alternate supplier. Dan may also take legal action against Mr. Martinson, which I will be happy to discuss with you when I return to Seattle on June 2.

Thereafter Schneringer engaged the services of FRP Plastics, Inc. of Green Bay, Wisconsin to fill the orders Martinson had failed to produce. Peter Pan Seafood, Inc. and Queen Fisheries, Inc. tendered purchase orders to FRP Plastics, Inc. along with a down payment.

Mr. Martinson testified in his defense. At the time of the offenses alleged, Mr. Martinson had been a life long resident of the State of Wisconsin. Mr. Martinson admitted receiving purchase orders and deposits from the fisheries. He also admitted failing to manufacture the products and return any deposits. He denied that it was ever his intent to defraud anyone.

Mr. Martinson stated several reasons why he had failed to produce the food equipment. First, he knew from

past experience that the delivery dates on such items were not firm and were often delayed without problem. This was confirmed by Mr. Schneringer. Second, Mr. Martinson testified that he never received all the required dimensions to properly manufacture the products. Third, Mr. Schneringer had effectively canceled the contracts by virtue of his conduct in causing his attorney to write to the fisheries advising them to seek other sources.

Mr. Martinson also testified that even as late as May, 1988 he could have produced the products in time for the canning season, had the contracts not been canceled by Schneringer. Mr. Martinson stated that the actions of Mr. Schneringer effectively prevented him from performing the contracts, albeit somewhat late.

On June 13, 1988, Mr. Martinson caused his attorney to contact, by letter, all the fisheries seeking to resolve their claims against him.

Mr. Martinson testified that he never took advantage of the protection of the Bankruptcy Act. He stated he felt that bankruptcy has become a much abused remedy. In fact, he consented to judgments in favor of all the fisheries for the full amounts of their deposits.

The jury found Mr. Martinson guilty on five (5) counts. A Judgment of Conviction and Sentence was entered on June 2, 1993. Mr. Martinson's conviction was affirmed by the United States Court of Appeals for the Seventh Circuit and his 2 point reduction for "acceptance of responsibility" was reversed and the case remanded for resentencing. Mr. Martinson now seeks review in this Court.

GROUNDS ON WHICH JURISDICTION IN THIS COURT IS INVOKED

On June 2, 1993, a judgment on conviction of sentence was entered against Edward Martinson for four counts of mail fraud and one count of wire fraud.

On October 7, 1994 the convictions were affirmed by the United States Court of Appeals for the Seventh Circuit. On January 9, 1995, Justice John Paul Stevens entered an Order granting Mr. Martinson an extension of time to file a Petition for Writ of Certiorari to and including January 26, 1995. Jurisdiction is conferred on this Court to review the judgment in question by a Writ of Certiorari pursuant to 28 U.S.C., § 1254.

REASONS TO GRANT THE PETITION FOR WRIT OF CERTIORARI

I. THIS COURT MUST INVOKE ITS POWER OF SUPERVISION TO CONSTRUE AND DEFINE THE PARAMETERS OF A DEFENDANT'S ENTITLEMENT TO A SENTENCE REDUCTION FOR "ACCEPTANCE OF RESPONSIBILITY" PURSUANT TO U.S.S.G., §3E1.1

Like it or not, the federal sentencing guidelines though laudatory in purpose do not work in practice. They are at best, confusing and at worst an invasion of the discretion conferred upon the district courts by the United States Constitution. This case is a patent example of the inability of the guidelines to perform as hoped.

It is hard to imagine a clearer showing of acceptance of responsibility than that demonstrated by the defendant in this record. Mr. Martinson went to trial admitting the essential conduct charged by the indictment. He admitted that he received deposits for equipment he did not produce. He admitted that he failed to return the deposits.

Mr. Martinson has accepted full responsibility for this conduct. He has admitted that he breached the agreements with his customers. He has admitted that he owes the customers their deposits. He has testified that he intends to pay the debt owed to the customers. He testified that he has not sought the protection of the Bankruptcy Act to avoid repayment. These admissions were made by Mr. Martinson in open court during trial. He did not wait until a judgment of conviction was entered to acknowledge his conduct.

U.S.S.G. §3(e) 1.1 Application Note 1(c) provides that a voluntary payment of restitution prior to adjudication of guilt is evidence of acceptance of responsibility. Though Mr. Martinson has not made actual restitution, he has taken significant steps in that direction. He deposited $21,000.00 of the customer deposits with his attorney in escrow in June of 1988 for the purposes of settlement of the customers' claims. He also entered into consent judgments in those suits that were filed against him as a result of these claims.

Considering his financial condition at the time, restitution was not possible in full. He did, however, take every other step that he could to make the alleged victims whole. All of these actions by Mr. Martinson were taken over five years before verdict and a like period before indictment.

In United States vs. Salvador, 18 F.3rd 1380 (7th Cir. 1994) this court held that where a defendant goes to trial, the acceptance of responsibility is measured primarily by pre-trial statements and conduct. The pre-trial and pre-indictment conduct of Mr. Martinson clearly demonstrates his acceptance of responsibility.

In United States vs. Reno, 992 F2d 739 (7th Cir. 1993) the court quoting Judge Zagel endorsed the following standard for determining acceptance of responsibility at page 744:

> I believe that the acceptance of responsibility as dealt with in the guidelines means acceptance of responsibility in the moral sense, not strictly in the legal sense. (emphasis applied.)

There can be no doubt that Mr. Martinson has accepted the moral responsibility for his conduct. In fact, he has never avoided it at any time.

In United States v. Beserra, 967 F.2d 254, 256, (7th Cir.), cert. denied, ---U.S.---,113 S.Ct. 419, --- L.Ed.2d --- (1992) the court held as follows:

> Judicial inquiry into acceptance of responsibility is a search for expiatory deeds and, failing those (for the defendant may have had no opportunity to perform such deeds) for conscience.

The pre-trial actions and deeds of Mr. Martinson in atoning for his conduct provides ample basis for acceptance of responsibility.

The analysis of Judge Evans at the sentencing hearing clearly demonstrates that Mr. Martinson is entitled to an offense level reduction for acceptance of responsibility. Judge Evans made the following statements:

> "...Intent was the only issue involved here. In all of these business type disputes where a scheme to defraud is alleged there's always a kind of blurring of

the line between civil responsibility under the civil law and criminal responsibility and just where that line is and where it is crossed and what might ordinarily be a civil dispute over an inability to perform a contract after work has been, after payment has been received, part payment and when that becomes criminal in nature. Just where that line is a pretty gray area.

I think that [Edward D.] Martinson acted appropriately in taking this case to a trier of fact to decide whether he had the reckless intent to commit a crime. As to all other aspects of this case, he essentially admitted and took responsibility for his actions, acknowledged his indebtedness, didn't try to hide by claiming the work was actually done or something, anything of that nature, didn't raise any of these other what would have been in this case bogus defenses. He has never sought...the protection of the bankruptcy laws; he's acknowledged his responsibilities here.

I think in a business type case like this where [Edward D.] Martinson does deny that he had criminal intent but nevertheless admits that he did receive money and not perform and did all these other acts, that he's entitled to a two point acceptance of responsibility. It's a close question. I think it could be either way here...I think the evidence supports the jury verdict that there was criminal intent here, sufficient criminal intent to support a conviction. But ton the other hand I also think that [Edward D.] Martinson by his actions in this case personally, through his attorneys, that he has accepted responsibility and accordingly he will get

two points for acceptance of responsibility. (emphasis supplied).

Acceptance of responsibility is a factual determination to be made by the district court. That determination will not be disturbed unless clearly erroneous. United States v. Beal, 960 F.2d 629 (7th Cir.) cert. denied, ---U.S.---, 113 Sup.Ct. 230, 121 L.Ed. 2d 166 (1992). Judge Evans determined that Mr. Martinson was entitled to a reduction in the offense level for acceptance of responsibility. Not only was this determination not clearly erroneous, but was intelligently made, supported by the record and patently appropriate.

The Court of Appeals has effectively ruled that a Defendant who goes to trial forfeits any consideration for "acceptance of responsibility". This is not and should not be the law. This Court must intercede and reverse the holding of the Court of Appeals.

II. THIS COURT SHOULD USE ITS POWER OF SUPERVISION TO REVERSE THE CONVICTIONS OF EDWARD MARTINSON FOR MAIL FRAUD AND WIRE FRAUD FOR THE REASON THAT THE EVIDENCE

FAILED TO PROVE HIM GUILTY BEYOND A REASONABLE DOUBT AND HIS SUBSTANTIAL LIBERTY IS AT STAKE.

No sufficient evidence exists in this record to support the jury verdict of guilty against Mr. Martinson. In U.S. v. Cosentino, 869 Fed.2d 301 (7th Cir. 1989) the Seventh Circuit Court of Appeals held at pages 307-308 as follows:

> In order to convict the defendants under 18 U.S.C. section 1341, the government must adduce sufficient evidence with respect to three elements: (1) the existence of a scheme to defraud in which the defendants were participants; (2) intent to defraud on the part of the defendants; and (3) use of the mails in furtherance of the scheme.

More recently in U.S. v. Norby Walters, appeal no. 92-3420, slip opinion at page 3, the Seventh Circuit Court of Appeals held:

> "Whoever, having devised...any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises... places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service...or knowingly

> causes [such matter or thing] to be delivered by mail" commits the crime of mail fraud.

However, it is not every deceit that constitutes the federal crime of mail fraud. Walters, supra.

The offenses of mail fraud and wire fraud are not designed to encompass all unsuccessful business enterprises nor every breach of contract. U.S. v. Kreimer, 609 Fed.2d 126 (C.A. Ga. 1980).

In this case, no direct evidence was presented to establish a scheme to defraud or an intent to defraud on the part of Mr. Martinson. At best, the government's case amounted to proof of a civil breach of contract.

The record demonstrates that even the government recognized the lack of definitive proof on the issue of intent even in the pretrial stage. At the sentencing hearing the government's counsel stated:

> And to be quite candid with the Court, I know that the government and our office in particular even at the time that this case was indicted and as we presented it through trial

> were wrestling with this issue of intent and exactly where to draw the line that is between a civil disposition and a criminal resolution of the case through the grand jury process. (Emphasis supplied.)

The government's counsel continued:

> At the same time, and so that, and so I indicate that to suggest that perhaps Mr. Martinson didn't sit down one night and say I'm going to draw up a list of six companies on the west coast, I'm going to set out to defraud them. I don't think that was this kind of a purposeful criminal conduct. (Emphasis supplied.)
>
> And even the fall of 1987 it may well be that Edward Martinson intended to make good on those contracts, thought that somehow some way he would be able to resurrect his relationships with them and make good on his promises to them. But at some point that changed. And I can't indicate to the Court exactly when that may have been but my sense is it must have been very shortly after that, after that contact between Mr. Martinson and Mr. Schneringer.

So, too, the district court stated the equivocal nature of the proof regarding the issue of intent. The court stated at the sentencing hearing:

> Intent was the only issue involved here. In all of these business type disputes where a scheme to defraud is alleged there's always a kind of blurring of the line between civil responsibility under the civil law and criminal responsibility and just where that line is and where it is crossed and what might ordinarily be a civil dispute over an inability to perform a contract after work has been, after payment has been received, part payment and when that becomes criminal in nature. Just where that line is a pretty gray area. (Emphasis supplied.)
>
> It's a close question. I think it could be either way here. But even the nature of this case, it not like an armed robbery of a bank or something where you can admit you went in with a gun but you weren't really planning on doing the robbery. This is, there's a clear line between criminal conduct and non-criminal conduct in that situation. In this it's a very blurry area with responsibilities and generally not clearly spelled out. (Emphasis supplied.)

The court continued:

> I don't think Ed Martinson started out in any way here to defraud anybody. (Emphasis supplied.)

While the government and the district court support the jury's verdict, these statements clearly demonstrate

reasonable doubt regarding the issue of intent. The question becomes whether Mr. Martinson was proved beyond a reasonable doubt to have formulated a scheme and possessed the requisite intent to defraud. This record demonstrates that no such proof was made. The government and the district court candidly so state.

There is no direct evidence of a scheme to defraud or any intent to defraud in this record. There is no proof in this record that Mr. Martinson could not have delivered the products for the season even if production had begun as of May 1988. On the contrary, Mr. Schneringer was successful in obtaining FRP Plastics, Inc., to produce the goods requested under two of the contracts within the period of mid-May to mid-June. Clearly, it was physically possible to produce the goods within the time frame remaining as of May, 1988.

The record shows that the delivery dates, were estimated dates, subject to scheduling. The important dates

were the start of the canning season for each of the fisheries. Mr. Schneringer testified that the earliest date was mid-June which meant that as of May, 1988 there was still time to produce the goods.

Mr. Martinson's direct testimony was more than sufficient to overcome the circumstantial case made by the government. Mr. Martinson unequivocally stated that it was never his intent to defraud anyone.

Instead, Mr. Martinson explained clearly why he had failed to produce under the contracts. First, he was aware from prior experience that the delivery dates on such goods were as a matter of custom, not firm and often delayed without problem. Mr. Schneringer confirmed this fact.

Second, Mr. Martinson testified he never received all the required dimensions to properly manufacture the product. The government's physical evidence on this issue consisted of two exhibits, showing dimensions for some, but not all, of the transactions. These documents were not sent directly

to Mr. Martinson but he was only sent copies. He stated they were not received.

Third, Mr. Schneringer in May, 1988, had written to all the contract purchasers advising them that Mr. Martinson could not produce the product and advising that they should seek other suppliers. This effectively canceled the contracts. Mr. Schneringer's actions prohibited Mr. Martinson from proceeding under the contracts.

Mr. Martinson testified that even as late as May, 1988, he could have produced the products in time for the canning season had Mr. Schneringer not canceled the contracts.

Once the transactions had been canceled by Mr. Schneringer, the evidence shows that Mr. Martinson took responsibility for the default and attempted a resolution with the fisheries.

On June 13, 1988, Mr. Martinson caused his attorney to contact by letter all the fisheries seeking to resolve their claims against him.

Mr. Martinson also demonstrated a clear lack of intent to defraud by taking responsibility for the losses incurred by the fisheries. He consented to judgments in favor of all the fisheries who instigated lawsuits against him for the full amounts for their deposits. He also avoided the protection of the Bankruptcy Act. He stated that he felt that bankruptcy was a much abused remedy.

The issue here is the existence of a scheme and Mr. Martinson's intent to defraud. The proof must be beyond a reasonable doubt. This record fails to show to this such standard.

While circumstantial evidence may be presented to prove these charges, justice requires that any doubt must be resolved in favor of the Defendant.

Mr. Martinson was convicted without any direct evidence of these two essential elements of the charges upon a prosecution conceived in substantial doubt. The government's trial presentation has done nothing to remove that doubt. The jury determined that Mr. Martinson, 5 years prior, had devised a scheme to defraud with intent. The record belies their decision.

Individual liberty is perhaps the most precious right conferred on an individual by the United States Constitution. It should not be abridged without a quantum of proof which so overwhelmingly evidences guilt that no doubt can exist. This is not the case here. This Court must reverse Mr. Martinson's convictions.

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 93-2379 & 93-2643

UNITED STATES OF AMERICA,

Plaintiff-Appellee, Cross-Appellant,

v.

EDWARD D. MARTINSON,

Defendant-Appellant, Cross-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 92 CR 239—Terence T. Evans, *Chief Judge.*

ARGUED SEPTEMBER 9, 1994—DECIDED OCTOBER 7, 1994

Before BAUER, and FLAUM, *Circuit Judges*, and FOREMAN,* *District Judge.*

BAUER, *Circuit Judge.* A jury convicted Edward Martinson of five counts of mail and wire fraud, in violation of 18 U.S.C. §§ 1341, 1343. It found that Martinson had fraudulently induced six seafood distributors to deliver partial payments for the purchase of certain kinds of food processing equipment that Martinson had agreed to manufacture but never did. Martinson appeals several aspects

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* The Honorable James L. Foreman of the United States District Court for the Southern District of Illinois is sitting by designation.

of his prosecution: the district court's denial of his motion to reschedule, his conviction on the grounds of insufficiency of the government's evidence against him, and his sentence. In addition, the government cross-appeals the district court's finding that Martinson accepted responsibility for his crime and the subsequent reduction of Martinson's sentence. We affirm Martinson's conviction and those issues he raises on appeal regarding his sentence; further, we reverse the district court's decision that Martinson accepted responsibility for his crime and remand for resentencing.

I. Facts

Martinson entered the food processing equipment manufacturing industry in 1986, doing business as Martinson & Associates of Green Bay, Wisconsin. His objective was to manufacture mechanical equipment used in the commercial processing of seafood products. In his initial foray into this business, he successfully performed under contracts with Farwest Fisheries, Inc. to produce and deliver retort baskets used to process seafood. To secure this contract, Martinson used as his agent Daniel C. Schneringer of Kirkland, Washington, doing business as Schneringer & Associates, because Schneringer had expertise in this arena and maintained several contacts within the cannery industry in the Pacific Northwest.

Martinson renewed his association with Schneringer in late 1987 to execute similar contracts with other canneries. Schneringer was to receive a commission on all sales that he negotiated, and Martinson was responsible for all aspects of production, shipment, and billing. In late 1987 and early 1988, Schneringer negotiated agreements with Farwest Fisheries and five other canneries to produce and deliver seafood processing machinery. Each cannery agreed to and did advance to Martinson fifty per cent of the total purchase price of machinery it ordered; the canneries forwarded these funds either by the United States mail or via wire.

When Martinson failed to meet the first delivery deadline, Schneringer called Martinson in hopes of learning the reasons for the delay. When Martinson offered nothing but unsatisfactory excuses, Schneringer scheduled a trip to inspect Martinson's facilities. In an effort to dissuade Schneringer from coming, Martinson admitted to Schneringer that he had not yet begun to manufacture the food processing equipment. Undeterred, Schneringer travelled to Green Bay, only to discover that Martinson did not own or even have access to the necessary manufacturing facilities. At this point, Martinson claimed that he had subcontracted with two other firms to manufacture the equipment. Schneringer soon learned from these companies that Martinson had lied yet again.

The only contact Martinson had had with either of these two firms was to sell some of his manufacturing equipment necessary to produce the seafood processing equipment to FRP Plastics, Inc., owned by Louis H. LaCount. LaCount testified that Martinson had admitted to him that Martinson had entered into manufacturing contracts and had accepted advances, but had done nothing to meet the orders. Martinson also admitted to LaCount that he had used the advances to finance the operation of Martinson's tavern in Green Bay, the Country Club Bar. It seems that Martinson spent over $80,000 (of the $112,000 advanced to him) to renovate and operate the tavern. Martinson spent this money despite never delivering the equipment ordered by the canneries or refunding any of the money he received from them.

II. Analysis

A. Denial of Martinson's motion to reschedule his trial

"Because of the broad-ranging, almost standardless discretion that a trial court must exercise in scheduling trials, the grant or denial of a [motion to reschedule a trial] is subject to appellate review only for an abuse of discretion." *United States v. Stevenson*, 6 F.3d 1262, 1265 (7th Cir. 1993) (citations omitted). To establish that the district

court abused its discretion, Martinson must show that the decision was arbitrary and that it caused him actual prejudice. *United States v. Woods*, 995 F.2d 713, 716 (7th Cir. 1993). Perhaps the heavy burden which Martinson bears with respect to this issue explains the brevity of his argument in his brief.

A brief recitation of the circumstances surrounding the district court's decision to deny Martinson's motion demonstrates that its decision neither was arbitrary nor resulted in actual prejudice. On January 29, 1993, Magistrate Judge Goodstein conducted an arraignment and plea hearing in this matter, where Martinson pled not guilty to the charges. At this hearing, Magistrate Judge Goodstein established a schedule for the conduct of further proceedings and announced that Martinson's trial would commence on March 23, 1993, before Judge Evans. On March 11, 1993, Martinson's counsel sent a letter to Judge Evans requesting that the trial be rescheduled. In support of his request, Martinson's counsel stated that his own workload coupled with Martinson's unavailability for a period of several weeks in February left him with insufficient time to prepare Martinson's defense. The government offered no formal objection to this request. Judge Evans denied this request following a March 12, 1993, telephone conversation with counsel. Martinson's counsel renewed the motion at the start of trial on March 23, 1993, which Judge Evans again denied.

In denying the motions, Judge Evans noted that Martinson did not object to the trial date at the time it was announced. He further noted that when Martinson requested leave from the court to travel to Australia for several weeks in February, his counsel made no motion to reschedule the trial. Judge Evans also cited as support for his decision to deny the motion his heavy docket and the fact that forty-four venirepersons were waiting for the start of the trial.

Martinson's only argument is that since it took the government five years to develop its case, he should have been granted a few weeks to mount his defense. He glosses

over the fact that had he stuck around in February, he would not have created the time crunch his counsel experienced in preparing his defense. Judge Evans' reasons, on the record, clearly indicate that his decision was not arbitrary. Martinson, moreover, offers no evidence that he suffered actual prejudice from Judge Evans' decision. Consequently, we hold that Judge Evans appropriately exercised his discretion in denying Martinson's last-minute motions to reschedule his trial.

B. Sufficiency of the evidence

In reviewing Martinson's claim, we must review the evidence in a light most favorable to the government, drawing all reasonable inferences. *United States v. Boykins*, 9 F.3d 1278, 1282 (7th Cir. 1993); *United States v. Gutierrez*, 978 F.2d 1463, 1468 (7th Cir. 1992). Then, we must ascertain whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Boykins*, 9 F.3d at 1282 (quoting *United States v. Tanner*, 941 F.2d 574, 586 (7th Cir. 1991)). In this case, the government's evidence easily supports Martinson's conviction.

The government presented as witnesses representatives of all six companies defrauded by Martinson. In addition, it offered Schneringer's and LaCount's testimonies regarding their respective encounters with Martinson. Finally, the government presented bank records and other documentation demonstrating that Martinson received the advances, deposited them, and spent the proceeds on his bar and in other ways unrelated to the manufacture of seafood processing equipment. All of this evidence compels just one result: that Martinson bilked these companies out of $112,000 and never intended to repay them.

Martinson's argument to the contrary simply restates his testimony from his trial. He claims that the delivery dates were never firm, that Schneringer failed to provide him with information necessary to manufacture the equipment, that Schneringer canceled the contracts, and that he, Martinson, never intended to swindle the companies.

He claims that these excuses preclude a trier of fact from finding the requisite criminal intent; he is wrong. This testimony was presented to the jurors, who chose not to believe him. In light of the government's evidence, it would be hard to fault them.

Martinson also argues that certain statements made by the prosecutor and Judge Evans at Martinson's sentencing hearing indicate that they did not believe Martinson had the requisite intent. These statements do no such thing. First, these statements were made at the sentencing hearing after the trial in which the prosecutor participated, over which Judge Evans presided, and where Martinson was found guilty beyond a reasonable doubt by a jury of his peers. Nothing in the sentencing hearing bears on Martinson's conviction. Second, the statements that Martinson may not have harbored an evil intent from the outset of this transaction was simply an acknowledgment of potential mitigating circumstances with respect to his sentencing and nothing else. The government's parade of evidence amply supports Martinson's conviction, and we affirm that conviction.

C. Martinson's sentence

Martinson claims that Judge Evans improperly computed the loss amount pursuant to United States Sentencing Commission, *Guidelines Manual*, § 2F1.1. Under this section, a defendant's base offense level is six, but the provision mandates an increase in the offense level based upon the total amount of loss. USSG § 2F1.1(b)(1). In this case, $70,000 becomes the magic number. USSG § 2F1.1(b)(1)(G). For if the total loss is more than $40,000 but less than $70,000, the offense level is increased by five. If the loss exceeds $70,000, however, the offense level is increased by six. The district court calculated a total loss in excess of $105,000 and an offense level of twelve.[1] Martinson claims

[1] The district court disallowed approximately $7,500 because that transaction occurred in 1986 and, as such, was barred from consideration by the statute of limitations.

that the offenses for which he was convicted involved a total loss of less than $70,000, and his offense level, therefore, is eleven.

It is true that the government dropped one count of mail fraud on the eve of trial,[2] and that the elimination of this count dropped the loss value below $70,000. The district court, however, included in its calculation the transaction supporting this count because it constitutes relevant conduct. Application Note 6 to § 2F1.1 states that "the cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction." This application note and our cases make clear that relevant conduct is an appropriate basis on which to base a defendant's sentence. In addition, we do not find that the district court's factual finding regarding this conduct is clearly erroneous. *See* 18 U.S.C. § 3742(e). We, therefore, find that the district court properly applied the guidelines, calculated the loss value, and determined Martinson's offense level pursuant to § 2F1.1.

D. The government's cross-appeal regarding Martinson's acceptance of responsibility

The government argues that the district court committed clear error when it found that Martinson accepted responsibility for his actions and, therefore, reduced Martinson's offense level by two pursuant to USSG § 3E1.1. It relies on Martinson's failure to plead guilty and his vehemence in denying any criminal intent, even after his conviction, during sentencing and on appeal to this court. We agree with the government and find that the district court's find-

[2] Shortly before the commencement of Martinson's trial, the prosecutor learned that the transaction underlying Count Five of the indictment alleging mail fraud actually involved wire fraud. It decided to drop that count rather than obtain a superseding indictment. As we shall see, it did present evidence of this transaction as relevant conduct at Martinson's sentencing hearing.

ing that Martinson accepted responsibility for his crime is clearly erroneous.

Acceptance of responsibility means that "the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." USSG § 3E1.1(a). A defendant may demonstrate this by performing any number of expiatory acts. *United States v. Beserra*, 967 F.2d 254, 255 (7th Cir. 1992); USSG § 3E1.1, comment. (n.1). Except in rare circumstances, a plea of guilty is a necessary, if not a sufficient, condition for acceptance of responsibility. USSG § 3E1.1, comment. (n.2). Application Note 2 states:

> This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.

We must also note that even if a defendant does plead guilty, without more he is not entitled to a reduction. USSG § 3E1.1, comment. (n.3).

As the government strongly argues, Martinson refused to plead guilty and has steadfastly maintained at every phase of this prosecution that he lacks any criminal intent. The district court based its finding on Martinson's statements that he took the money from the canneries and his acknowledgment that he still owes it to them. The

district court finds further reliance on Martinson's (overblown) statement that he refuses to file for bankruptcy. But Martinson's statements regarding this whole scheme indicates that he is not a man in whom we can detect "glimmerings of conscience."

Martinson continues to blame every other party in this deal but himself. His attempts to shift the blame travel from the ridiculous to the sublime: He blames Schneringer for fouling up the deal at every turn (even though the canneries hold Martinson responsible and continue to do business with Schneringer), the canneries for refusing to ask him for the money back (if only it was that easy!), *and* he implicitly blames his local lending institution for forcing him to improperly convert the canneries' funds because it refused to make him a loan to renovate his bar. Martinson still claims he is innocent of criminal charges. He has never once said: "I did it; I was wrong." This is not one of those rare instances in which a defendant has put the government to its proof and may still maintain that he has accepted responsibility. Martinson has obviously not accepted responsibility for his crime and is undeserving of a reduction of his offense level.

III. Conclusion

For the foregoing reasons, Martinson's conviction, the district court's denial of Martinson's motion to reschedule his trial and its determination under USSG § 2F1.1 is AFFIRMED. We REVERSE, however, the district court's finding that Martinson accepted responsibility for his crime, and we REMAND this matter to the district court to recalculate Martinson's sentence.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA A07XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—10-7-94

AO 245 S (Rev.4/90) Sheet 1 - Judgment in a Criminal Case

UNITED STATES DISTRICT COURT

RECEIVED
93 JUN -4 AM 1. 0.
U.S. ATTORNEY
EASTERN DISTRICT OF WISCONSIN

Eastern District of Wisconsin

UNITED STATES OF AMERICA
V.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Edward D. Martinson

Case Number: 92-CR-239

(Name of Defendant)

Edward A. Scott, III
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____
[x] was found guilty on count(s) 1,2,3,4 & 6 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:1343 & 2	Wire fraud	1/14/88	1
18:1341 & 2	Mail fraud	3/24/88	2,3,4&6

U.S. District Court
Eastern Div. of Wis.
I hereby certify that this is a true and correct copy of the original now remaining of record in my office.
SOFRON B. NEDILSKY, Clerk
DATED: 6/3/93 By _____ Deputy

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[x] Count(s) 5 (is)(are) dismissed on the motion of the United States.

[x] It is ordered that the defendant shall pay a special assessment of $ 250.00 for count(s) 1,2,3,4 & 6, which shall be due [x] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 397-58-0907

Defendant's Date of Birth: 12/20/32

Defendant's Mailing Address:

Defendant's Residence Address:

1150 Londonberry Lane

Glen Ellyn, IL 60137

6/2/93
Date of Imposition of Sentence

Signature of Judicial Officer

Terence T. Evans, Chief Judge
Name & Title of Judicial Officer

6/2/93
Date

AO 245 S (Rev.4/90) Sheet 2 - Imprisonment

Defendant: Edward D. Martinson Judgment--Page 2 of 5

Case Number: 92-CR-239

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 5 months as to each of counts 1,2,3,4 & 6 to be served concurrently.

[x] The court makes the following recommendations to the Bureau of Prisons:

Oxford Camp

[ ] The defendant is remanded to the custody of the United States Marshal.
[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at _____ a.m./p.m. on _____
[ ] as notified by the United States Marshal.

[x] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,
[ ] before 2 p.m. on _____
[ ] as notified by the United States Marshal.
[x] as notified by the probation office after 30 days.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

AO 245 S (Rev.4/90) Sheet 3 - Supervised Release

Defendant: Edward D. Martinson Judgment--Page 4 of 5
Case Number: 92-CR-239

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years as to each of counts 1,2,3,4 & 6, to be served concurrently.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[ ] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[x] The defendant shall not possess a firearm or destructive device.

The defendant is to serve the first 5 months of supervised release in home detention, flexible for the defendant to leave for legitimate business purposes.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

AO 245 S (Rev.4/90) Sheet 6 - Restitution and Forfeiture

Defendant: Edward D. Martinson Judgment--Page 4 of 5
Case Number: 92-CR-239

RESTITUTION AND FORFEITURE

RESTITUTION

[x] The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution

The defendant is to make resitution in the amount of $105,055.85.

Payments of restitution are to be made to:

[ ] the United States Attorney for transfer to the payee(s).

[ ] the payee(s).

Restitution shall be paid:

[ ] in full immediately

[ ] in full not later than _____.

[ ] in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

[ ] in installments according to the following schedule of payments:

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

FORFEITURE

[ ] The defendant is ordered to forfeit the following property to the United States:

AO 245 S (Rev.4/90) Sheet 7 - Statement of Reasons

Defendant: Edward D. Martinson Judgment--Page 5 of 5
Case Number: 92-CR-239

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[x] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

See transcript

Guideline Range Determined by the Court:

Total Offense Level: 12

Criminal History Category: I

Imprisonment Range: 10 to 16 months

Supervised Release Range: _____ to _____ years

Fine Range: $ _____ to $ _____

[X] Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ _____

[ ] Full restitution is not ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.
[ ] for the following reasons: